

THE
D E C I S I O N
OF THE
C O U R T O F S E S S I O N,
UPON THE QUESTION OF
L I T E R A R Y P R O P E R T Y;

IN THE CAUSE

JOHN HINTON of LONDON, Bookseller, Pursuer;

AGAINST

ALEXANDER DONALDSON and JOHN WOOD,
Bookfellers in EDINBURGH, and JAMES MEUROSE
Bookfeller in KILMARNOCK, Defenders.

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M.DCC.LXXIV.

THE
DECEMBER 1910

OF THE
COURT OF S.E. 2100

FROM THE QUESTION OF
THE PROPERTY
IN THE CASE

JOHN NINTON & ALCOCK
AGAINST

ALFRED DOUGLASSON and JOHN WOODSON

THE COURT OF S.E. 2100
IN THE CASE

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H I N T O N A G A I N S T D O N A L D S O N, &c.

The SUMMONS, or LIBEL, in this Cause, was as follows :

GEORGE, by the grace of GOD, KING of Great-Britain, France, and Ireland, Defender of the Faith: To

Messengers at Arms, our Sheriffs in that part, conjunctly and severally, specially constituted, greeting. Forasmuch as it is humbly meant and shown to us, by our lovite John Hinton of London, bookseller, and by Alexander Maconochie writer in Edinburgh, his attorney and commissioner, conform to power of attorney, bearing date 26th September last, That where the Reverend Mr. Thomas Stackhouse, late Vicar of Beenham in Berkshire, Master of Arts, deceased, having, after many years study and labour, compiled a book, commonly known by the name of "Stackhouse's History of the Holy Bible;" he thereby acquired the sole and exclusive property of said book, and of printing and publishing the same: And that he, by his deed of alienation and vendition, dated 8th January, 1740 years, and registrate in the Commissary-court books of Edinburgh, as a probative writ, 19th October, 1770 years; did, for certain onerous causes therein specified, grant, bargain, sell, assign, and set over to Stephen Austin of London, bookseller, deceased, and to his executor, administrator, and assigns, the copy-right and sole privilege of printing,

re-printing, and selling, all the foresaid book, compiled and written by him, the said Mr. Thomas Stackhouse, and entitled, " A new History of the Holy Bible, from the Beginning of the World to the Establishment of Christianity, with Answers to most of the controverted Questions, Dissertations on the most remarkable Passages, and a Connection of Profane History all along ; to which are added, Notes explaining the difficult Texts, rectifying Mistake translations, and reconciling seeming Contradictions : The whole illustrated with proper Maps and Sculptures." And all the estate, right, title, interest, claim, and demand whatsoever, either in law or equity, or otherwise howsoever, of him the said Thomas Stackhouse, of, in, and to the said copy-right, and benefit of printing the said book ; and of, in, and to the said book, to have and to hold the said copy-right, and sole privilege of printing, re-printing, and selling the said book, and all benefit and advantage to be had or made thereby, unto the said Stephen Austin, his executor, administrator, and assigns, to and for his own use and benefit, as his own proper goods, and chattels, and estate, from thenceforth and for ever, as the said deed of vendition and alienation in itself more fully bears : And that the said Stephen Austin, in virtue of the foresaid vendition, did continue in the sole and exclusive possession of said book during his life, and of printing, selling, and publishing the same ; and he, by his latter-will and testament, dated 20th March, 1745, did nominate and appoint Elisabeth Austin, his wife, to be his executrix, and bequeathed to her his whole estate, real and personal, conform to an extract of said testament from the Prerogative court of Canterbury, dated 19th September, 1770 years : And that the said Stephen Austin having died in the month of December 1750 years, Elisabeth Austin, his widow, in virtue of said last will and testament, succeeded to his means and estate, and, *inter alia*, to the copy-right, and sole privilege of printing, re-printing, and selling the foresaid book, and whole profits and advantages accruing therefrom, and that as executrix and administratrix of her said husband : And that the said John Hinton, pursuer, having married the said Elisabeth Austin upon the 10th of August, 1752 years, conform to certificate of their marriage from the register-book of marriages of the parish-church of St. Sepulchre, dated 20th September, 1770 ; he thereby acquired the copy-right of said book, and sole privilege of printing, re-printing, and selling the same, and whole profits and advantages arising therefrom, and continued to print and publish the same as his sole property accordingly. But, notwithstanding his having the undoubted right and title to said book, and that he always had sufficient quantities of the same for sale : Yet some persons, within that part of Great Britain

Britain, called Scotland, have of late taken upon them, without his consent and authority, to print, re-print, and sell said book, for their own private advantage and profit; and in particular Alexander Donaldson, and John Wood, bookfellers in Edinburgh, and James Meurose bookfeller in Kilmarnock, did, in the year 1767, or on one or other of the years betwixt the year 1760 and 1770, without the consent and authority of the said John Hinton, pursuer, in a most fraudulent manner, and with a manifest view to deprive him of the profit and benefit arising from the publication of said book, take upon them to print, re-print, sell, and dispose of the foresaid book; at least they, or one or other of them, caused an edition or impression of the same, to the amount of ten thousand copies, or thereby, to be so printed and sold, and applied the price and produce thereof to their own use and behoof, or for the use and behoof of one or other of them: And they, or one or other of them, still continue publickly to sell said books so unlawfully printed by them, or employ other persons to sell and dispose of the same, in open defiance and violation of the said John Hinton, his absolute and exclusive right of property in said book: And albeit it is of verity, that the said John Hinton, pursuer, and his said attorney, have oft and diverse times desired and required the said Alexander Donaldson, John Wood, and James Meurose, defenders, to desist from selling and disposing of the foresaid book, so illegally printed by or for them, or for one or other of them, and to deliver to him such of the said books as are still in their custody, or in the custody of any other person for their behoof; and also to make payment to him of the sum of L. 1:10 sterling for each copy of said book so printed and sold by them, or either of them, or by any other person for their behoof, and likewise to make sufficient reparation to him for the injury he has sustained in his property by the printing and selling said book in the illegal and fraudulent manner abovementioned; yet they wrongously refuse, postpone, and delay so to do: And THEREFORE, it OUGHT and SHOULD be found and declared, by decreet of our Lords of Council and Session, that the said pursuer, John Hinton, has the copy-right, and sole and undoubted title and privilege of printing, re-printing, and selling the foresaid book, commonly called Stackhouse's History of the Bible, and to the profits and advantages from thence arising; and that the said Alexander Donaldson, John Wood, and James Meurose, defenders, have done wrong, and made a most illegal incroachment upon the pursuer's property, by printing, publishing, and vending the foresaid book; and the same being so found, the said Alexander Donaldson, John Wood, and James Meurose, defenders, ought and should be decerned and ordained, by decreet of our said Lords, to desist and cease from.

from all further printing, publishing, or selling said book, commonly known by the name of Stackhouse's History of the Holy Bible, and to deliver to the pursuer all copies of the said impression thereof, consisting of ten thousand copies or thereby, printed by them, or one or other of them, remaining unfold at the time; and they ought also to be decerned and ordained by decret forefald, conjunctly and severally, to make payment to the pursuer of the sum of L. 1:10 sterling for each copy of the said book, that they, or either of them, have sold to any person, or persons, and shall deliver less than the forefald number of ten thousand copies: and further, the said defenders ought and should be decerned and ordained, by decret forefald, conjunctly and severally, to make payment to the pursuer of the sum of L. 100 sterling of damages for their most unjust and illegal invasion of his property in the unwarrantable manner abovementioned, with a fraudulent intention to deprive him thereof, and in terror to others to commit the like practices in all time coming, or of whatever other sum our said Lords shall please to modify on that account; and they ought likeways to be decerned and ordained, by decret forefald, conjunctly and severally, to make payment to the said pursuer of the expences of this process, and of extracting the decret to follow hereupon, as the same shall be ascertained by our said Lords at discussing this process, conform to the laws and daily practice of this realm, used and observed in the like cases, as is alledged.

The C O U N S E L were,

For the PURSUER,
Mr. DAVID RAE,
Mr. ALEXANDER MURRAY,
Mr. ALLAN MACONNOCHIE.

For the DEFENDERS,
Mr. JOHN MACLAURIN,
Mr. ILAY CAMPBELL,
Mr. JAMES BOSWELL.

The cause came before the Lord *Coaston* Ordinary, who took it to report, and ordered Informations: That for the pursuer was drawn by Mr. *Rae*; and that for the defenders by Mr. *Campbell*. The Court also appointed a hearing in preface, which began upon the 20th of July 1773: All the six counsel spoke, and the pleadings lasted four days.

On the 27th the Judges delivered their opinions.

L O R D

L O R D K E N N E T.

WE have had this question very ably stated in papers, and very fully discussed in pleadings. I do not mean to run through all the arguments;—to support those on the one side, or confute those upon the other. I will not meddle with the law of England; in the first place, because I do not profess to understand that law; and, secondly, because I think it ought to have no influence in determining upon the law of Scotland. I presume the learned judges of the Court of King's Bench gave a just judgment upon the law of England; but they found much upon the acts of the Stationers Company, and the injunctions of the Court of Chancery, with which we in this country have no concern.

I am of opinion, that Literary Property is not in the law of Scotland. It is not in *the law of nature*, which is one great fountain of our law. The law of nature is not founded on metaphysical arguments, and to be deduced from long, abstruse, and abstract reasonings. It must be obvious to mankind, at least, as soon as it is proposed; according to the elegant passage in Cicero, mentioned by Mr. Murray, “*Est hæc non scripta, sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa arripuimus, hausimus, expressimus, ad quam non docti, sed facti, non instituti, sed imbuti sumus.*” It is in vain to say, that it is founded on that part of the law of nature, by which we are not to hurt another, or take from him what belongs to him; for to apply that is a *petitio principii*.—It is not in the *law of nations*: there is not the *consensus gentium*; for it is admitted, that no such *consensus* obtains. So far from this, we find it to be only such a kind of right as particular states have, in some instances, conferred by a patent, or *privilegium*, for a limited time.—It is not in the law of Scotland, properly so called. We have no *responsa prudentum* for it. It is not even mentioned by any of the writers on our law, except by Lord Bankton, when treating of the statute of Queen Anne. On the contrary, the practice of all our lawyers, who took limited patents for printing their works, shews that they entertained no such idea.—There is no *series rerum judicatarum*; nay not one judgment of this Court finding such a property.—There is no *statute* upon the subject, except the statute of Queen Anne, which appears to me to be against the common-law right. The rubric, or title of that statute, is clearly against it; for it bears to be, an act for *vesting* the right for a certain term: And it is material to

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consider,

consider, that the title at first stood otherways, and bore, to be for *securing*; but it was altered by the Legislature itself. Stress has been laid on the narrative of the act; but this I think the weakest part of it. The most material part is certainly the enacting clause; which confers the right for a limited time. I admit, that the words, *no longer*, add nothing to the sense. But then I see this to be an express clause, distinctly limited, and quite separate from the clause with regard to penalties. The most that can possibly be said upon this clause is, that if literary property existed antecedently, it does not take it away. But I do not see that it existed at all before the act. The last clause of the act, which provides, that “the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years,” would have been absurd, if authors were understood to have that sole right *ab ante*. I am therefore of opinion, that there is no right in authors to the sole printing of their works, except what the statute has rationally given.

L O R D A U C H I N L E C K.

THIS question is new and interesting: Till very lately, it never received a judgment in any Court of Europe. It has received but one, and that in England, the laws of which country are in many particulars special to itself, and, when it was there determined, the court was divided.

We have had the question ably handled in mutual informations, both of them well drawn; in particular, that on the side of the defenders, is a performance which does honour to the author: We have likewise had laboured and long pleadings, and now are to give our opinions.

In the entry, I cannot help observing, that it is well said by a wise man, *nil tam absurdum quod non dicendo fit probabile*: By much labouring any subject, the attention is apt to be drawn away from the real merits, and run into extraneous matter: As I think that has been the case here, and that the diversity of opinions has been owing to it,—in the opinion I am to give, I shall endeavour to confine myself to the proper merits of the case, without launching out into many of the learned arguments which both sides have insisted on.

I'll own, that the cause, when stripped of extraneous matter, does not appear to me to be difficult. The question is, whether he who writes a book, and publishes it, has, by common law, independent of any statute or privilege granted

granted him by the state, a perpetual property in that performance, in the same way as he had before publishing?

It is agreed by all; that while the book is not published, whether the work be in the author's head or his cabinet, it is absolutely his, and no man can deprive him of it. But the question is, if this right continues after publication?

There has been much said on the necessary consequence from its being once owned to be a man's property, that it should still continue to be so. But, with submission, the reasoning appears to me not just. My thoughts are mine so long as I retain them in my mind; but if I utter them, *nescit vox missa reverti*; every hearer has a right to them as much as I. A man need not speak in company unless he chuses it; but if he speaks, and does not enjoin secrecy, every man may propagate the sayings with impunity. If a man throws out a thing in company, whether instructive or entertaining, can he maintain that he has a right of property in this *bon mot* to him and his heirs for ever?

And here I beg leave to say, unless it can be shewn there is a right of property in what a person utters verbally, there can be none in what he publishes to all mankind by printing it. Indeed, when a man publishes his thoughts, he gives them away still more than the man who utters them in conversation. The latter gives them only to his hearers; but the former to the whole habitable earth.

For illustrating this, suppose several people well acquainted with this country, should go up to the castle of Edinburgh, and one of them, who liked speaking, should immediately describe all the objects he saw from it, would he acquire a right ever after to that description? And could he, by printing it, create a right not in him before?

What has created an obscurity, is, that ever almost since printing began, there have been privileges and grants given as to publications of books; and men are apt to intermix the notion of these rights with a common-law right, a right independent of grants; and the most part of the argument in behalf of the pursuer seems to have been derived from that source, particularly that from what is called *injunctions*, which supposed a right in the complainer to stop a publication.

But to come at the certainty; let us go back to the times before any law was made for privileges to publishers, or any patent granted to them; which is all after printing came in, which happened in the fifteenth century; and we shall find no attempt made to assert the author's property in any book
which

which he had published. We see, in the learned dissertations delivered in the court of our neighbouring country, stress laid on the King's right to print certain books, and this is said to be a right of property. It is true, the King has still a right to print certain books, and he has his own printer; in the choice of whom great care ought to be taken, which is not always the case; for I remember, in the year 1745, the same printer officiated for the King and for the Pretender: But this right of the King is *prerogative*, not *property*.

We had in Scotland pretty early, licenses granted to printers, particularly there is one in 1567, to *Robert Lickprivick*; and when your Lordships hear the list of the books which he obtained a special privilege to print, you will judge if they were the King's property. His license is to print, "Donatus pro Pueris, Rudiments of Pelisso, the Acts of Parliament, except these of the last part, the Cronicles of the Realm, Regiam Majestatem, the Psalms of David, with the English and Latin Catechisms less and mair, with the buik callit Omilies for Reideris in Kirks, with the general Grammar to be set out for erudition of Zouth.—The privilege to endure twenty years; and none to print the said buiks without his consent, under the pain of the escheat of the buiks, and being fined."

This privilege, and all such, were granted to printers, and were not calculated for the benefit of authors, and not founded on any right of property in the printer.

But there is not upon record in any country, not even in England, a patent, or privilege, in favour of any person whatsoever before printing; nor is there at this day any privilege granted to authors, which hinders as many copies to be taken of the work as people chuse, provided they be not printed copies: nay, these gentlemen, the London booksellers, who have obtained so many patents, and even the act of Queen Anne;—though they call *printers* who interfere with them *pirates*, (a cruel name), never pretend that they can hinder *written* copies to be taken. The law, then, is directed only against printing, and is no restraint from writing; though we all know, that, before the art of printing, there was no other method of spreading books. It was then a great trade. It may be so again; and the London booksellers would have no remedy. This is a clear proof, that the restraint was introduced after printing began, and that it is no way founded in common law, but on grants; for if it were founded on common law, it would reach against manuscript copies, as well as printed ones: and this to me is demonstration, that there is no common-law property in authors.

And,

And, as a farther illustration of this, let us consider, that anciently very valuable performances were preserved only by the memory. It is said *Homer* was so, and *Offian*. When that was the case, what privilege could the author have? The poem of *Chevy-chace*, so much celebrated, and upon which we have a criticism by Mr. *Addison*, was, in my remembrance, repeated by every body.—Was there a *copy* of this little heroic poem? What privilege could the author have in it, after he had let one man get it by heart?

Again, *extempore* compositions, such as all our sermons in this country were long ago, or were supposed to be, as some of us who are far advanced in life remember; for at that time a minister who used notes, and would not trust to Providence, as it was said, would have been very ill heard:—When, as was common, people took them down in writing, as some of them were very good, very entertaining discourses; had the preacher any property in these sermons? He could have none in the writing; for he never had written himself. Could he have said, that they were only intended for his own congregation, and were not to be communicated to others?—I apprehend the proprietor of these was the person who wrote;—for the author was not able to repeat what was in the copy.

In short, the whole of the author's plea consists in his claim to restrain from printing; and it is founded on blending the notions arising from privileges and patents with a common-law right, which is quite erroneous: and this clearly must put an end to the common-law right; for as it is directed only against printing, it is plain, that, before printing, there was no such right; that, to this day, it could not be pleaded against uttering as many manuscript copies as a man chuses;—so, consequently, it is not founded on common-law property.

I have said nothing of the act of the 8th of Queen Anne, for I do not think it necessary; but if there were any dubiety, that act removes it; for it gives the author a right under certain conditions, and for a fixed period.

B

LORD

L O R D H A I L E S.

AUTHORS in England may have a common-law right in their works, even after publication.

So English lawyers have said; so the Court of King's Bench has determined.

English law, as to us, is foreign law; foreign law is matter of fact. Of the fact I ask no better evidence, for I can have no better evidence, than the opinion of the lawyers and judges of that foreign country.

Whether this common-law right be considered as a *property* or as an *interest*, or as something distinguishable from either, is of no moment.

If we are once satisfied of the *existence* of a legal right, all enquiry into the *mode of its existence*, is superfluous.

This common-law right is strangely interpreted by the London bookfellers.

The Bishop of Gloucester, in his admirable Charge to his Clergy, has bestowed on the London bookfellers the appellation of *The Sages of St. Paul's Church-yard*.

The doctrine of these *sages* is commodious: they *limit* or *enlarge* this common-law right as best suits their own convenience.

They *limit* it, 1. when, maintaining that an author has a right to the *whole* of his work, they take the liberty of borrowing whatever *part* of the work may be a proper ingredient for their monthly hashes of literature, their *Universal Magazines of knowledge and pleasure*.

If a work chances to be short, they retail it in a news-paper under the appellation of a *criticism*, or an *extract*.

2. Again, they *limit* this common-law right by exciting their dependents to make abridgements of valuable works.

Herein Stackhouse, the author of this day, was an adept: he abridged the discourses pronounced at Mr. Boyle's lecture.

He and his bookseller would have condemned Donaldson and his associates for encroaching on the common-law right of Bentley or Gastrel: and yet *he* scrupled not to make, nor his bookseller to publish, an abridgement of the arguments of Bentley and Gastrel in defence of religion!

How much of the argument evaporated in this literary process, I pretend not to say.

Perhaps an abridger is held to acquire a right, by specification in the work abridged, according to the trite saying,

——“*malè dum recitas, incipit esse tuus.*”

3. They

3. They *limit* this common-law right by publishing *Dictionaries of Arts and Sciences*—the works of a hundred authors are ransacked; out of them is produced, as *the fages* express it, *an entire new work*.

Postlethwayt common-placed the authors who had written of trade and commerce. It would be hard, says he, [article *Books*], were I to be deprived of the fruit of my twenty years labour by a literary pirate. That is, it would be hard that any one should steal from me, what I have stolen from others.

To shew his consistency, he has transcribed Forbes's *Treatise on Bills of Exchange*, in so far as it relates to Scotland.

What right had he to plunder Forbes? Yet the London booksellers can see no fault in this, as long as they are *proprietors* of *Postlethwayt's Dictionary*.

4. They *limit* this right even in prerogative copies. They dare not print the text of the English translation of the Bible by itself; *that* belongs to the King; but they print it with notes, borrowed from Geneva sometimes, but more frequently from Poland.

Again, they *enlarge* the common-law right, and *that* in various ways.

1. It is admitted that there is no literary property in works whereof the author is absolutely unknown.

If there ever was an anonymous writer, it is the author of the practical treatise entitled *The Whole Duty of Man*. At this day even the sex of the author is problematical.

Nevertheless, the *trade* have found means to appropriate to themselves a copy in which the pious author pretended no property.

Dr. Hammond, in his commendatory epistle, observes, that the author had thrown the work into the *Corban* or common treasury: the London booksellers have taken it out of the *Corban*.

And how? from Dr. Hammond's commendatory epistle they learn, that Garthwait the publisher, had the MS. in his possession *before* he printed the work: therefore the property of the book is in the heirs or assigns of Garthwait.

On this momentous discovery, that a publisher was possessed of the MS. which he published, is founded the injunction 1735.

This, by the way, shews that injunctions have been granted sometimes without much attention to the merits of the cause.

2. The London booksellers *enlarge* the common-law right by conferring the name of *original author* on every *tasteless compiler*.

Hereof there is an apposite example in Stackhouse, the author of this day. He was as very a compiler as ever descended from a bookseller's garret.

The incorporeal substance of Stackhouse's ideas is a non-entity.

And

And yet, in the opinion of *The Sages in St. Paul's Church-yard*, Stackhouse is no less an original author than Hooker or Warburton.

Here lies my first difficulty: were we to copy the judgment of the King's Bench in the case *Miller versus Taylor*; were we to find that the common-law right of authors in England could be made effectual in Scotland; were we even to find that literary property was established in the law of nature and nations; still we could not pronounce judgment for the pursuer, unless we were to hold Stackhouse to have been an original author; *this* I can never do.

But I have still a farther difficulty.—“In this case it is material to consider how the common law of Scotland stood before the statute of Q. Anne.” These are the words of an eminent personage on a similar occasion.

This inquiry was not *material*, had he understood literary property to be grounded on the law of nature and nations: *that* law varies not in different countries: according to the elegant passage which we heard from the bar, it is not *aliud Romæ, aliud Athenis*: neither was the inquiry *material* if the common-law right in England could have had effect in a foreign country.

The inquiry which that great man thought material has been made.

Of this right there is not a vestige to be discovered in the law of Scotland.

From Lord Stair down to Forbes all our authors are silent concerning it: from Lord Stair down to Forbes all our authors have acted as if there had been no such right.

It is said, “that the privilege which Lord Stair obtained prohibiting others from printing his works did indeed confer nothing upon him, but that his remedy lay by an ordinary action at law.” Strange that he should have sought and obtained a privilege which gave him no right, and that he should never have mentioned that right which he had!

It is vain to say “that our authors lived under the despotic sway of a Scottish Privy Council, and that they were obliged to accommodate themselves to those wretched times.”—The Scottish Privy Council was not despotic after the Revolution: it was a legal court and legally administered: it was indeed abolished at the union of the two kingdoms, not because it was despotic, but because it could no longer subsist: for the same reason, and at the same time, the English Privy Council was abolished.

Many of our authors lived not in *wretched times*: Lord Stair published his corrected work after the Revolution; Forbes wrote in the days of Q. Anne; Lord Bankton in the days of George II.

I dare not pronounce *that* to be a right in the law of Scotland, which has escaped the observation of all our statutes, lawyers, and authors.

I therefore must give my judgment for the defenders.

L O R D

L O R D M O N B O D D O.

THIS cause, whatever way it shall be decided, does great honour to our Bar ; for it has been most ably pleaded, nor do I remember ever to have heard a better pleading. It is a very important cause. It is of importance, as being perhaps the cause of greatest property that ever came before us ; the property indeed is immense, we know not the extent of it : and it is of importance in another respect, that it divided the present Judges of England, and my Lord Hardwick would give no opinion upon it. I am to give my opinion with the majority of the English Judges. If it had been on the other side, I should have given it with the same freedom.

As this cause has been treated, the first question is,—Whether such a property as I contend for, of authors in their works, can at all exist ? For, a great deal of argument has been used to prove, that such a property is a mere chimaera, incapable of being defined or ascertained. This part of the argument, I own, surprised me a good deal : for it must be allowed, that such a property is given by the statute, at least for a time ; and, if it be given by the statute for a time, there is nothing to hinder it to be given by common law for a perpetuity. And the nature of it is sufficiently defined by the statute ; for it is there said to be, “ the sole liberty of printing or re-printing the book.” It is therefore what every right of property is,—the right of using a thing exclusive of others. And the use of the thing in this case ascertained by the statute, is, the printing or re-printing of the book. For, there may be sundry uses of the same thing ; and as many uses as there are, so many different rights or interests there may be in it. If I purchase a book, I may use it for my instruction or amusement, or I may employ the paper or binding of it as I think proper ; and so far I may be said to have the property of it. But, I cannot re-print it, because that use belongs to the author or his assignee, and so far he is proprietor. Here is nothing obscure or unintelligible, but it is what every man, even though he be no philosopher, can readily conceive. All, therefore, that we have heard about the absurdity of a property in ideas, appears to me to be nothing to the purpose. Ideas, or *bon mots*, as my brother said, are not by their nature a subject of property. For property, though it be an *incorporeal* right, it must have for its subject some *corporeal* thing : But, supposing they were capable of property, I allow every man who purchases a book to appropriate the ideas of it to himself as much as he can, and the words too, if his memory be good enough. I think I could go farther without hurting my argument,

gument, and admit that he may carry those ideas in his mind, and those words in his memory, to a printing press, and get them thrown off. Such a man I would call a *plagiary*, but not the *pirate* of a book; nor do I think that he would fall under the sanction of the statute, which only forbids him to use the book for a press-copy, to transfer the author's words from paper to paper, by the mere mechanical operation of printing, without any labour of the mind; but does not prohibit him to exercise either his memory or judgment upon it.

This being the nature of literary property, the next question to be considered is, Whether there be such a property at common law, independent of the statute? And let us begin with the manuscript.—That every author has a property in his own manuscript, has not been denied. And it has been admitted, that, in consequence of this property, he may, as the law now stands, print it if he pleases. Thus far, therefore, he may reap the fruits of his property. But these, it is said, are the only fruits he can reap. For if the MS. is once printed, and the copy sold, then it becomes *juris publici*, and every man is at liberty to reprint it, and make what profit of it he can. If this be so, the property of a MS. is a property of a very extraordinary kind, of which a man can only make profit once: whereas other things, which are the subject of property, we may use for our profit as often as we please, and hinder others from interfering with us in that use.

Let us suppose that the author, instead of multiplying his MS. by the press, makes several copies of it in writing; and let us suppose, that he gives the use of one of those copies to a friend. This happened in the case of Lord Clarendon's history, and it was there adjudged, that the person who got the use of the copy had not a right to print it, though it did not appear that when he got it he was laid under any restraint or limitation as to the use of it. It is true, indeed, that the person in that case got the use of the MS. for nothing. But would it have altered the case, if Lord Clarendon's heir, in consideration of the expence or trouble of transcribing the MS. had made him pay something for the use of it? Or suppose that, instead of transcribing it, he had taken the more expeditious way of making copies of it by the press.

It appears, therefore, that by giving the use either of MS. or book for hire, or without hire, I do not give the liberty of printing or re-printing it, even though no such condition was mentioned. And so it was adjudged by my Lord Hardwick in the case of a *Letter*, of which the man to whom it is written and sent, appears to be as much proprietor, as any man of any book or MS.; and yet he is not entitled to print it. I hold it to be part of the contract of emption, when a book is sold, that it shall not be multiplied. If, in the

the sale of a book, it were made a condition, that the buyer should not re-print it, all your Lordships would be of opinion, that he would not have that right. Now I say, that, in the case of a printed book, it is not only *understood* that the possessor of it shall not re-print it; but it is *expressed*. For the title-page bears, that it is printed either for the author or for some bookseller, to whom he has assigned the right of the copy; the meaning of which cannot be, that the author or bookseller has a right to the copies already printed, (for as they are in his possession such advertisement is altogether unnecessary), but to intimate, that he has the sole right of printing. So that the selling a book with such a title, is in effect covenanting that the purchaser shall not re-print it.

The common law of Scotland and England, must, I think, be the same in this case, as the common law of both is founded upon common sense and the principles of natural justice, which require that a man should enjoy the fruits of his labours. For it is certainly contrary to justice, that a man should employ perhaps his whole life in composing a book, and that others should enjoy the profit of printing and publishing it, "to his very great detriment, and too often " to the ruin of him and his family," as is said in the preamble of the statute.

It has been said that literary property is unknown in this country, and was not known till of late in England: That in this, and other kingdoms of Europe, authors did formerly secure to themselves the profit of their works by getting patents from the crown, with the exclusive privilege of printing them for a certain number of years: And particularly our great lawyers, Sir George M'Kenzie, Lord Stair, and Lord Dirleton, took patents of this kind for the printing of their works.—To this, I answer, that in those times, the licensing the press was held to be part of the prerogative: Sir George M'Kenzie has expressly said, that it was *inter regalia*: No man therefore had then a right to print any thing without the permission of the king; so that every copy of a book was what is now called a prerogative copy; and upon this foot matters still continue in the other kingdoms of Europe. But in Britain, it is now admitted, that the king has no such prerogative, except as to Bibles, common-prayer books, or law-books, which cannot yet be printed without his permission; of such books, I think, the king may be properly enough said to have the property; which, as it is defined by the statute, consists in the exclusive privilege of printing. And accordingly, I see that in England, the king's right to prerogative copies is maintained upon the principle of property: and the same right that the king has to those books, every author has to the book he writes, now that the encroachment of the crown upon the liberty of the press is at an end.

end. And thus I think a very good reason may be given why authors have now a right in their works which they were not supposed to have before.

The re-printing a book has been compared to the imitating or copying of an engine, which every man may do, if the inventor has not secured to himself the property of it by a patent. But the cases are very different; for the printing of a book is a mere mechanical operation, which a man may perform without understanding one word of it: Whereas, no man can copy an engine, unless he have in his mind the idea of that engine, and know the purpose for which it is intended, and the mechanical powers by which it operates: Now, so far as concerns ideas, and every operation of the mind, any man who purchases a book is absolute master of it. But with respect to the multiplying of copies by the mechanical operation of the press, that belongs only to the author; and in the same way the imitating a print or copperplate is to be distinguished from the printing a book, or the taking an impression of the copperplate. This last is a mere mechanical operation like printing; whereas, the imitating a copperplate by engraving a new plate, is like copying a picture, a work of some taste and genius, and often very ill performed. Every man therefore was at liberty to engrave any print, though it had been invented and first engraved by another, till he was prohibited by the act, 8th Geo. II. But as the two operations of engraving and printing are so different, no argument can proceed from the one to the other.

The last thing to be considered is, whether supposing a right to exist at common law, it be taken away by the statute. And I have the satisfaction to find, that the Judge in the Court of King's Bench, who was single in his opinion there, as I shall probably be here, did not think it was taken away, if it did once exist. The argument drawn from the word *vesting* in the title of the statute to prove that authors had no right before, is not at all conclusive; for the same word occurs in the title of the act annexing the estates lately forfeited to the crown, which however did certainly belong to the crown before that act was made. The word, in both titles, signifies nothing more than that a fuller right was given, and of more ready execution, than what was given by the common law: Besides, the title of an act is but once read, whereas, the preamble is thrice read, as well as the rest of the act. Now in the preamble of this act, the right of an author to his works is asserted in express terms: And if there were any doubt in the matter, it is removed by that proviso in the end of the act, by which it is declared, that nothing in the act shall either prejudice or confirm any right claimed by any person to the printing or re-printing any book or copy. This leaves the matter just where it was before

Before the statute, and appears to have been intended to obviate this very doubt, whether the right which formerly belonged to authors was not taken away by this statute, giving them a new right, I mean a right secured by penalties and forfeitures.

As to the alledged inconveniencies of literary property, the clearest principles of law may be attended with inconveniencies; but that consideration belongs not to us, but to the legislature. Here, however, I see no inconveniencies; on the contrary, were there not such a property, such a right, there would be great inconveniencies, great injustice. I think it would be very hard, and much to the discouragement of literature, if an author, after spending a laborious life in composing a book, did not provide by it, not only for himself, but also for his family: Nor is the remedy in the statute against this evil sufficient; for, the best books may be twenty years published, without having their merit known, and afterwards have a great and universal sale. The copy of Milton's *Paradise Lost* was sold for fifteen pounds, and it is probable that the bookseller lost by it; for, it is certain, that the book was in no repute, or estimation, till my Lord Sommers let the people of England know that they had in their language the best heroic poem of modern times.

Upon the whole, therefore, I am of opinion, *1mo*, That authors had a right of property in their works before this act was made; and *2do*, That such right was not taken away by the act.

L O R D J U S T I C E C L E R K.

THIS question comes before the Court, upon a simple case.—It is an action of damages brought by a bookseller of England, against the defenders, residing and carrying on their business, as printers and booksellers, in Scotland, for re-printing a book first published in England in the year 1738. It is not founded upon statute, or letters patent, but upon the *copy-right* originally vested in the author, and derived from him, to this pursuer, by which he claims the sole right of printing this book, and of debarring all others forever from printing the same, and consequently that he is entitled to recover damages from these defenders, for their illegal encroachment upon his exclusive right.

As the action is brought in this Court, and against subjects residing in this country, we can have no rule for our judgment, but the law of Scotland; and the fair way of trying the case is, first, by supposing the action brought

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by the executor or assignee of a Scotch author, who had first published his book in Scotland thirty or forty years ago; and the question is, Whether the law of Scotland acknowledges any such original property, or *copy-right*, in the author?

I do not mean to enter at large into the grounds assigned for this *copy-right*, but to say in general, that it falls under none of the ideas, principles, or definitions of property, which I have learnt in the common law of this country.

No vestige of it is to be found in the ancient world, though the same grounds of it existed then as at present. No trace of it can be discovered in modern nations, even since the art of printing was invented, England only excepted.

Before publication this *copy-right* in the author exists, and must have all the effects of property in every nation.

But when a man publishes his book, and sells it, he makes every purchaser absolute owner of what he purchases; and the necessary consequence of that ownership is, that he may transcribe as many copies of it as he pleases, and consequently may re-print it.

The force of this observation is well perceived by the pursuer's counsel; and, in order to obviate it, they suppose a *tacit condition* not to re-print, as concomitant of every purchase of a book.

But this is very inaccurate; because it resolves into a *petitio principii*. I admit that in any country where this *copy-right* in the author is established by law, such tacit condition will be implied in the contract, and the right of re-printing will not be understood to be transferred by the sale of the book. But where no such *copy-right* or exclusive privilege is established, or known in the law of any country, there are no *termini habiles* for such tacit condition, and the sale of a copy of the book, transfers to the purchaser the right of using it as a proprietor, by transcribing or re-printing as many copies of it as he pleases.

In establishing the various modes of acquiring property, the law has followed the dictates of the human mind, sufficiently partial to its own interest, and able to discern the grounds upon which property, or an exclusive right in any subject, may be acclaimed.

But, in this instance, the law, it seems, has given to men a property, a *copy-right*, of which they had no idea nor conception. For it is certain, that neither Homer, nor Virgil, nor Chaucer, nor Spencer, had any idea, that, after they published their works to the world, they, and their heirs and assigns,

assigns, retained this property, this exclusive right of transcribing, or re-printing their works for ever.

In short, upon examination it will be found, that there is no foundation for this *copy-right* in authors, in the common principles of law, and that the only ground for it is this, that, from the love of knowledge, and the admiration of the works of learning and genius, mankind are prone to give to authors, not only the merit, but the reward that is due to them for their works; and upon this principle every civilized state in modern times has introduced exclusive privileges to authors, in the publication of their own works, some for a longer, some for a shorter time. But this suggests no idea of an original property in the author; on the contrary, it is inconsistent with it: for if such property previously existed in the author, how should it have occurred to Sovereigns, meaning to encourage authors, to limit the endurance of the author's right to a certain term of years; which is the case of all letters patent known in the different states of Europe, and of our statute of the 8th of Q. Anne, which enacts a general privilege to all authors for a certain time.

The principle of these letters patent, and of our act of Queen Anne, is to give an encouragement to authors, which they could not have had by common law. Their purpose is not to give effect to a property which was antecedently in the author, but to lay a restraint upon the right of the other subjects, by prohibiting them from re-printing such authors works, during the term of their privilege.

It is said, that it is fit and expedient to give to authors a perpetual property in their own works.

I should doubt much of the expediency of enacting such a perpetual property. But if the argument from expediency were clearer than it appears to me, it cannot influence the present question. It may have its weight with the legislature; not with me, in determining what the law is.

Neither can I see, if I were to judge of expediency, where to draw the line; for, notwithstanding all that has been said, I cannot, for my life, difference the author of a new book, from the inventor of a new machine, or of a new medicine; they are equally the works of genius and industry, and in their publication may be equally useful to mankind.

But if I were of opinion, that it would be expedient to give this copy-right, this perpetual property to authors, what avails it, if it is not given by the law of Scotland. And this leads to the decisive branch of the argument, Whether the law of Scotland has given, or, in any shape, has acknowledged, this *copy-right* in authors.

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The known sources, or component parts of the law of Scotland are, our statutes, the Roman law, the ancient customs of the kingdom, the doctrines of our lawyers, and the decisions of this court; all these have been investigated, and no trace or vestige is to be found of this idea of a *copy-right* or property in an author, upon which the present action is founded. On the contrary, we find all our great lawyers, in effect, admitting, that there is no such principle in the law, which they certainly did, by resorting in all cases to letters patent from the sovereign, for the exclusive publication of their own works for a limited time, never exceeding twenty-one years.

To this may be added the confessed usage of the kingdom, furnishing a number of instances of books first published in Scotland, and, when not protected by letters patent, or after the expiry of such letters patent, re-printed there, without any injunction, sist, or suspension by this court, for staying such re-publication, or any action of damages at the suit of the authors, their heirs or assigns, against the printers.

Such being the state of our law, I do not see how this court could possibly award damages in the case supposed of a process brought by the executor or assignee of a Scotch author, who had first published his book in Scotland, not protected by letters patent, or, after the expiry of such patent, against the re-printers of such a book in Scotland.

The second question arising upon the present case is, Whether or not this court can award damages to the executor or assignee of an author who had first published his book in England against the defendants, for re-printing such book in Scotland, at the distance of thirty or forty years from the first publication.

The action is not founded upon letters patent, nor upon the act of Queen Anne, which does not apply to the case, but upon the common law of England, by which, it is said, an author has a copy-right or property in his book, and consequently must be intitled to a decree in this court, for rendering that property effectual against the subjects of this country, who have invaded that property.

But supposing this species of property to be known, and even established in the common law of England, I deny the consequence drawn from it. The law and judicatures of Scotland will give their aid to an Englishman, and to every foreigner, for rendering effectual every property, and every right established in him by the law of his own country, not adverse to the property and right of the subjects of this country, established in them by the common law of Scotland.

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Thus property of every kind founded upon the known principles of the law of nations; all rights and obligations founded upon covenant, without regard to the mode or form of that covenant, will have their full effect in this court, at the suit of a foreigner, against the subjects of this country: because the law of Scotland, and of all civilized nations, give effect to such property and to such rights; and the subjects of this country can have no legal defence against the suit. But when an action is brought in this court for making effectual a property or right, founded upon the peculiar law or constitution of a foreign country, not only not acknowledged in the law of Scotland, but contrary to the principles of the common law of Scotland, and to the right and property of the subjects, as founded in that common law, it is impossible for this court to sustain such action; because the subjects of this country are to be governed by their own law, and not by the law of another country.

If an English statute had enacted this *copy-right* in authors, it could have had no effect against the subjects of Scotland; how then can a right, founded upon the judgments of the courts of England, in affirmance of a common-law right in authors, be binding upon the subjects of this country? They certainly are no more bound by the common law than they are by the statute law of England.

In the whole of this argument, I have kept entirely clear of the late decision in the Court of King's Bench: I have the highest respect for the judges of that court; but that judgment has nothing to do with the present case; because it can have no effect upon the common law of Scotland.

That judgment proceeded upon a variety of matter, of which there is no vestige in the common law of Scotland.

If the same question had occurred in the King's Bench soon after the art of printing was introduced into England, I presume the judgment would have been different, because the court would have then wanted almost the whole materials, upon which their late judgment is founded.

We are now in a stronger case, as not only wanting that variety of matter and precedents, upon which the late judgment of the Court of King's Bench proceeded, none of which exist in our law, but having also the sense of all our great lawyers, and the usage of the kingdom, ever since printing was known amongst us, standing in opposition to this *copy-right* of authors.

Upon the whole, I am humbly of opinion, that the defenders ought to be absolved from this action.

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L O R D

L O R D K A M E S.

WHAT may be the law of England, with respect to the question at present under deliberation, I pretend not to know. Nor is it necessary that I should know; because an alledged trespass committed in Scotland against the pursuer, and prosecuted for damages in the Court of Session, must be determined by the law of Scotland.

I know no foundation for damages, but a breach of contract, which is not pretended in this case; or an injury to one's person or character, which is as little pretended; or a hurt to his property; and this last is the ground upon which damages are claimed.

Let us then enquire into the nature of the property here insisted on. The meaning of *property*, in the laws of all nations, is a right to some corporeal subject, that can be possessed, that can be transferred from hand to hand, that goes to heirs, that may be stolen or robbed, and that may be demanded by a real action, termed *rei vindicatio*. The pursuer's right is not of that nature. When a man composes a book, the manuscript is his property: if it be stolen from him, he may demand it by a *rei vindicatio*: it may be gifted by him, or sold. But by such gift, or sale, the property is transferred to the purchaser: he has now the same right over it that the composer had originally: he may suppress it, or he may publish it to all the world.

What is then the nature of the pursuer's right? He does not pretend to say, that it is a right to any *corpus*, to any subject that can be possessed, or that can be stolen from him. *Ergo*, it is not property. Taking it in all views, no more can be made of it than to be a privilege or monopoly, which intitles the claimant to the commerce of a certain book, and excludes all others from making money by it. The important question then is, from what source is this monopoly derived, a monopoly that endures for ever, and is effectual against all the world? The act of Queen Anne bestows this monopoly upon authors for a limited time upon certain conditions. But our legislature, far from acknowledging a perpetual monopoly at common law, declares that it shall last no longer than a limited time.

But to follow out the common law. The composer of a valuable book has great merit with respect to the public: his proper reward is approbation and praise, and he seldom fails of that reward. But what is it that intitles him to a pecuniary reward? If he be intitled, the composer of a picture, of a machine, and the inventor of every useful art, is equally intitled. Such a monopoly, so far from being founded on common law, is contradictory to the first principles

ciples of society. Why was man made a social being, but to benefit by society, and to partake of all the improvements of society in its progress toward perfection? At the same time, he was made an imitative being, in order to follow what he sees done by others. But to bestow on inventors the monopoly of their productions, would in effect counteract the designs of Providence, in making man a social and imitative being: it would be a miserable cramp upon improvements, and prevent the general use of them. Consider the plough, the loom, the spinning wheel. Would it not sound oddly, that it would be rank injustice for any man to employ these useful machines, without consent of the original inventors and those deriving right from them. At that rate, it would be in the power of the inventors to deprive mankind both of food and raiment. The gelding of cattle for food, was not known at the siege of Troy. Was the inventor intitled to a monopoly so as to bar others from gelding their cattle? What shall be said of the art of printing? If the monopoly of this useful art was to be perpetual, it would be a sad case for learned men, and for the interest of learning in general: it would enhance the price of books far beyond the reach of ordinary readers. Such a monopoly would raise a fund sufficient to purchase a great kingdom. The works alone of Shakespeare, or of Milton, would be a vast estate. The art of making salt water fresh is a very late invention. Was it ever dreamed to be a transgression against property, to use that art without consent of the inventor?

I observe, in the next place, that this claim, far from being founded on property, is inconsistent with it. The privilege an author has by statute, is known to all the world. But I purchase a book not entered in Stationer's hall; does it not become my property? I see a curious machine, the fire engine, for example. I carry it away in my memory, and construct another by it. Is not that machine the work of my own hands, my property? I buy a curious picture, is there any thing to bar me from giving copies without end? It is a rule in all laws, that the commerce of moveables ought to be free; and yet, according to the pursuer's doctrine, the property of moveables may be subjected to endless limitations and restrictions that hitherto have not been thought of, and would render the commerce of moveables extremely hazardous. At that rate, the author of every wise or witty saying, uttered even in conversation, has a monopoly of it; and no man is at liberty to repeat it.

Lastly, I shall consider a perpetual monopoly in a commercial view. The act of Queen Anne is contrived with great judgment, not only for the benefit of authors, but for the benefit of learning in general. It excites men of genius to exert their talents for composition; and it multiplies books both of instruction

instruction and amusement. And when, upon expiration of the monopoly, the commerce of these books is laid open to all, their cheapness, from a concurrence of many editors, is singularly beneficial to the public. Attend, on the other hand, to the consequences of a perpetual monopoly. Like all other monopolies, it will unavoidably raise the price of good books beyond the reach of ordinary readers. They will be sold like so many valuable pictures. The sale will be confined to a few learned men who have money to spare, and to a few rich men who buy out of vanity as they buy a diamond or a fine coat. The commerce of books will be in a worse state than before printing was invented: at that time, manuscript copies might be multiplied at pleasure; but even manuscript copies would be unlawful if there were a perpetual monopoly. Fashions at the same time, are variable; and books, even the most splendid, would wear out of fashion with men of opulence, and be despised as antiquated furniture. The commerce of books would of course be at an end; for even with respect to men of taste, their number is so small, as of themselves not to afford encouragement for the most frugal edition. Thus bookfellers, by grasping too much, would lose their trade altogether; and men of genius would be quite discouraged from writing, as no price can be afforded for an unfashionable commodity. In a word, I have no difficulty to maintain that a perpetual monopoly of books would prove more destructive to learning, and even to authors, than a second irruption of Goths and Vandals. And hence with assurance I infer, that a perpetual monopoly is not a branch of the common law or of the law of nature. God planted that law in our hearts for the good of society; and it is too wisely contrived to be in any case productive of mischief.

Our bookfellers, it is true, aiming at present profit, may not think themselves much concerned about futurity. But it belongs to judges to look forward; and it deserves to be duly pondered whether the interest of literature in general ought to be sacrificed to the pecuniary interest of a few individuals. The greatest profit to them ought to be rejected, unless the monopoly be founded in common law beyond all objection: the most sanguine partizan of the bookfellers will not pretend this to be the case. At the same time, it will be found, upon the strictest examination, that the profit of such a monopoly would not rise much above what is afforded by the statute. There are not many books that have so long a run as fourteen years; and the success of books upon the first publication is so uncertain, that a bookfeller will give very little more for a perpetuity, than for the temporary privilege bestowed by the statute. This was foreseen by the legislature; and the privilege was
wisely

wisely confined to fourteen years; a sufficient encouragement to men of genius without hurting the public interest. The best authors write for fame: the more diffused their works are, the more joy they have. The monopoly then is useful only to those who write for money or for bread, who are not always of the most dignified sort. Such writers will gain very little by the monopoly; and whatever they may gain at present, the profits will not be of long endurance; a monopoly would put a final end to the commerce of books in a few generations. And therefore, I am for dismissing this process as contrary to law, as ruinous to the public interest, and as prohibited by the statute.

L O R D G A R D E N S T O N .

I THINK we are bound to take notice of the pleadings in this cause.—They have been admirable on both sides.—The lawyers are entitled to our thanks; and I do not believe that ever this question has been debated with greater ability than by the Scotch bar.—I cannot agree with any of your Lordships who consider this as a clear case.—I think it is a nice and difficult question.—I own I have been puzzled to fix my opinion.—In my first reflection on the argument, I was strongly inclined to embrace the opinion of a literary property.—I was moved by the great object of encouragement due to learned and ingenious men.—By the apparent justice and reason of a right and property in a man's own works, and the productions of his genius or industry;—and I was greatly moved by the authority of a judgment pronounced by a court of high reputation in our neighbouring country.—But my maxim is, and ever shall be, *nullius addictus jurare in verba magistri*; and, on the fullest consideration of this matter, I am now of opinion, that authors have in reason and equity a right to be protected in the sole and exclusive publication of their own works for a limited time. But the nature of the thing, and the practice of nations, admits not of a real and perpetual property.

The question in England depended upon the common law of that country. There is no need of argument to prove an undeniable proposition, that we must judge by the common law of Scotland; in which I cannot find a sufficient foundation for this claim of perpetual property in authors.

There are three fountains from which the common law of Scotland is derived: 1st, From certain usages and customs which have been long and uniformly observed; the origin of which in some cases cannot be traced. Our law of death-bed is an example of this. 2^{dly}, A great fountain of our common

law is the civil law of the Romans, in so far as it has been received in our practice, and is evidently just and applicable to cases undetermined in our own law: and some of our statutes mention the Roman law as the common law of Scotland. *3dly*, I admit into our common law every principle of justice, as distinguished from mere obligations of morality, which have been allowed and received as principles of justice by other civilized nations.—I have examined this claim of literary property under those different branches of our common law.

As to the first, our usage stands against the plea of a property in authors.—It is an upstart property in this country, which authors have never claimed, and our lawyers have never asserted. They have always contented themselves with demanding that limited protection which a patent gave. *2dly*, It is admitted, that there is no foundation for this plea in the civil law, though we find in it the greatest variety and the most subtle distinctions of property. *3dly*, The principles of reason and justice, as approved by all civilized nations, do support the author's claim to a temporary protection or privilege, not to a property or perpetual right.—Upon this ground I chiefly rest my opinion. The most substantial and convincing evidence of what is really just and rational, in a matter of public concern to all countries, is the concurring sense of nations. For above three hundred years, and ever since the invention of printing, all the nations and states in Europe have, by their practice, established the nature of an author's right. They have granted no more than a temporary privilege, and in that they have all concurred. I make no narrow distinctions of Popish and Protestant,—monarchies and free states. It is certain, that since the æra of printing, and of the reformation, even the Popish countries have been greatly enlightened; nor has learning and justice been confined to the Protestant and free countries only. This is the substantial ground of my opinion. I can conceive, in a question of this nature, no authority of equal weight with the sense and concurring practice of civilized nations for ages. The splendid error of one great man may mislead many; but I cannot be easily induced to think, that the concurring sense and practice of nations is erroneous.

It does not appear to me that this question is of such importance even to the literary trade of London booksellers as they seem to imagine; and I am clear that authors have no concern in the question at all. The term of legal protection outlives the great bulk of books that are published. Nine hundred and ninety-nine of a thousand have little merit but their novelty: they are once read by idle people for amusement, and are never thought of again. How few books published in the last century are re-printed in this? How few books
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of this will be re-printed in the next? We had in Scotland some good solid law-books, and books of wild divinity; the latter may exist in some odd libraries. Lord Stair's Institutions has been re-printed, by which, I am informed, the bookseller lost. That book was re-printed without leave of his heirs; indeed I know not how many people must have been applied to, had it been understood to be *in bonis* of Lord Stair; and even the best authors are obliged to sell their works to the bookseller.

When I consider this question of literary property upon principles of reason and expediency, I find so many intricacies, something so anomalous and inconsistent in this idea of perpetual property in an author's work after he has published it to all the world, that I cannot assent to it. The great argument, or *ratio dubitandi*, which I own at first almost convinced me, is, that the author has undoubtedly a property-right in the original manuscript composed by himself; why should he lose it by publication, as he intends only to give the instruction or pleasure of reading, not the profit of publication or re-printing? I answer, that certainly the author has a real property in the manuscript of his own work; but, in the nature of the thing, by publication, he gives his work to the public, and he gives the same species of property to every individual who buys his book, which he had in the original copy before publication. This is a natural, a necessary, and a legal consequence of the sale, and it has been so understood and settled by the sense and practice of nations ever since printing was introduced: So that every man who purchases a book, being thereby unquestionably proprietor, has a right to use it at his discretion; to multiply the copies by transcribing, or by printing, except in so far as he may be restrained by statute, or the legal interposition of the sovereign, or the equitable injunctions of the civil magistrate.

I have never been able to find a solid and substantial distinction between the right of an author in his book after publication, and the right of a person who invents a machine, after he makes it public. The distinctions which I have heard in the course of this debate, appear to me too metaphysical and immaterial. When I was inclined to the opinion of literary property, and bent to answer this objection, I found it insurmountable; at least, the distinctions are too nice for my discerning, or too unsubstantial for my principles of judging in matters of right. I will draw the comparison in every material point, and I think they coincide exactly. The author has a property admitted on both sides in the manuscript copy of his composition before publication. Is there any doubt that the inventor of a machine, which may be more beneficial to mankind than any book, has also a property in his work before it is made public?—It is
said

said that the author of a book cannot be supposed to intend by publication and sale to part with his property in the literary composition, as contained in the original manuscript; and may it not with equal reason be supposed, that the inventor of a machine does not mean to sell his art or invention? he sells only the individual machine to be used for the purposes which it was contrived to serve. A distinction was made, that the mechanic who makes a machine, after the model of the original inventor, employs his own art and genius; it is an act of imitation which he cannot be barred from exercising: But the act of re-printing is merely mechanical, having no similarity to the author's art or genius. This seems also an immaterial distinction. The most stupid mechanic, incapable of any invention, far less the most sublime and useful, can as easily execute a machine, when he sees the model or original composition, as the most ignorant booksellers and printers can make a new edition of a book without any share of the author's taste or genius. There is nothing can be more similar, than the work of engraving is to literary composition. I will illustrate this proposition by the works of Mr. *Hogarth*, who, in my humble opinion, is the only truly original author which this age has produced in England. There is hardly any character of an excellent author which is not justly applicable to his works; what composition—what variety—what sentiment—what fancy—invention—and humour—we discover in all his performances! In every one of them an entertaining history, a natural description of characters, and an excellent moral: I can read his works over and over, *Horace's* characteristic of excellency in writing; *decies repetita placebit*, and every time I peruse them, I discover new beauties, and feel fresh entertainment. Can I say more in commendation of the literary compositions of a *Butler* or a *Swift*? There is great authority for this parallel. The legislature has considered the works of authors and engravers in the same light; they have granted the same protection to both; and it is remarkable, that the act of parliament for the protection of those who invent new engravings, or prints, is almost in the same words with the act for the protection and encouragement of literary compositions.

The strange consequences which would arise from this new doctrine of perpetual property in authors, have been well explained, and have great weight in my opinion. I shall mention some of those consequences, which affect me most. There is either an absolute right of property in authors, or only an equitable claim to protection and exclusive publication for a limited time.—The last is agreeable to the practice of nations, and, I think, to material justice and expediency. If we admit the first, it is an unlimited right of property, and must have all the effects of property in other subjects. Let us try this
literary

literary property, by applying the principles of property in other subjects to it. This is a fair test to discover if it be current and legitimate property or not. There are three material things which concern property. *1st*, The objects or subjects of it. *2dly*, The manner or mode in which it is conveyed among the living. *3dly*, The manner in which it is transferred from the dead to the living. The ordinary subjects of property are well known, and easily conceived. We have lands and tenements, houses and gardens, fishings, and moveables of great variety. But property, when applied to ideas, or literary and intellectual compositions, is perfectly new and surprising. In a law-tract upon this species of property, the division of its subjects would be perfectly curious; by far the most comprehensive denomination of it would be, a property in nonsense. It must also be branched out into the property of bawdy, blasphemy, and treason. For an instance, we might specify Mr. *Wilkes's* property in No 45.; in his licentious Essay on Woman; and in his abominable writings to inflame and divide the minds of a people united by nature, interest, and government. By the just principles of property, no man can lose his right in whole or in part, without his own act and consent. According to this principle, I cannot think it would be justifiable to translate a book without the author's warrant; for thereby you take the benefit and profit of his composition. You take his ideas, his sense and meaning, which is really his literary property, from him; as if I should take a piece of cloth from a manufacturer, and dye it of a different colour; I have taken the substance from the owner, the superficial appearance is only my own. This puts me in mind of the method practised by Mr. *Bayes* in the *Rehearsal*, to appropriate other men's wit. Mr. *Bayes* says, "I take a book in my hand; if there is any wit in it, as there is no book but has some wit, if the wit be in prose I turn it into verse; this I call *transversing*, and so I make it *my own*; if," says he, "it be in verse, I turn it into prose, which I call *transprosing*, and make that my own." Mr. *Bayes* had a perfect idea of this literary property, and had a method of stealing wit from conversation too. "I go," says he, "where witty men resort; I make as if I minded nothing,—do ye mark;—if any one says a good thing, pop! I slap it down;—and so make that my own too!"

If this is a real property, it must be theft to publish an author's work without a right from him. Literary property makes a strange figure in this view. The theft of all other property must be gainful, if the thief escape with impunity: But this is a perilous theft by the nature of it; in many cases the thief will be a loser by taking the author's property; for booksellers know well, that many a publication is attended with loss. In most cases, it would be but petty

larceny; at worst, in a very few, the most aggravated and capital crime.—Who steals from common authors, steals trash; but he who steals from a *Spencer*, a *Shakespeare*, or a *Milton*, steals the fire of heaven, and the most precious gifts of nature.—So we must have new statutes to regulate those literary felonies.

Let us push this analogy of the principle of property in other subjects a little farther. If the publication of a whole work is theft, to publish parts of it must also be theft; as a man is undeniably a thief who steals five guineas out of my purse, in which there is twenty:—Quotation is therefore literary theft. I have always believed that the author of a book called the *Elements of Criticism* is an ingenious man, and a very honest gentleman; but in this view of the matter, he lies under a very criminal charge; every page of his book is enriched with quotations from the most classical poets and other authors.

The most perplexing difficulties would arise by the transmission of this property from the dead to the living. By the principles of our law, a man's moveable estate is understood to lie in *bonis defuncti*, untill it is vested in proper form in the person who is entitled to take that succession. It sounds oddly, that a man's ideas and his literary compositions should lay in *bonis defuncti*. Shall learning and genius be vested in an idiot by confirmation? But there are more serious inconveniencies and incongruities from this perpetual succession in literary property. By the law of Scotland, possession of moveables presumes property, and this property is unembarrassed by any written titles; but the literary property must for ever be transmitted by titles in writing, and a perpetual progress of title-deeds will be necessary. Tho' land estates are secured by a proper title, and forty year's possession, which cannot be applicable to this species of property; in the course of time, and various successions, it must happen, that the property of books must be split and divided among a vast and indefinite number of sharers. No publication can be legally made without the concurrence of all the common proprietors; for it is an indivisible property, and the inextricable inconveniencies arising from this are apparent. As to the authorities from the law of England, I shall say little. We must judge from our own laws, and our own ideas of property. I cannot however think, that the injunctions in Chancery are to be considered as judgments upon the right. Considerations of equity in particular cases may afford sufficient ground for a temporary injunction, without supposing a perpetual property. The statute of Queen Anne, which no doubt extends to Scotland, is, in my opinion, no foundation of a just argument on either side of the question; for the saving clause expressly leaves the point of any separate right
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which authors may claim, entire and undetermined. Upon the whole, I am of opinion, that, by the common law of Scotland, authors have no property or perpetual right in their works after publication; and that it would neither be just nor expedient to allow it.

L O R D C O A L S T O N .

THIS is not a question in which authors are much concerned; for whether their exclusive right of publication is supposed to be perpetual, or temporary to subsist for the space of twenty-eight years, will make no great difference as to the extent of the price which will be paid to the author.

But though the question is of no great importance to authors, yet it is a question in which the bookfellers of London, on the one side, and the whole subjects of this country in general, and more particularly all the other bookfellers in Britain, on the other side, are deeply concerned: for if the pursuer shall prevail in this question, the plain consequence will be, to establish a perpetual monopoly in favour of the bookfellers of London, not only over most of the valuable books which have been hitherto published in this kingdom, but also over all books which may be published in time coming.

The general question is, Whether, after a voluntary publication of an author's works by himself, or by his authority, the author has, at common law, a sole and perpetual property in that work, so as to give him a right to confine every subsequent publication to himself and his assigns for ever?

It is singular that this, though supposed to be a common-law right, has not been acknowledged in any country except England; and even there it appears to have been only a modern invention, always disputed, and never settled, till a late decision in the Court of King's Bench, which was not unanimous; and in another case which has since occurred in England, the point is now under appeal.

In these circumstances, it is incumbent on the pursuers to establish the principles in the law of nature, and common law of Scotland, on which their claim is founded.

The pursuer's plea is founded on this supposition, that an author has a perpetual *property* in the stile and ideas of his work. But I cannot admit this proposition, as it is essential to *property*, that it should relate to something corporeal and tangible; whereas abstract ideas are not corporeal, but purely spiritual and mental.

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There are other essential characteristics of property,—that it should be descendible to heirs, affectable by creditors, and forfeitable for crimes ; none of which can apply to abstract ideas.

A question has been put, At what period this property in authors is supposed to commence or attach ?

Is it from the first conception, from the time they are reduced to writing, or from the time of the first publication ? I do not see how an exclusive right, which is essential to the idea of *property*, can commence or attach at any of these periods ; as the same ideas might have occurred to others, independent of the publication.

And as to what is said, that the same ideas cannot occur to two different persons :—I admit, in works of imagination that can scarcely happen.

But in intellectual works it is otherwise.

In mathematical works, the ideas and composition must be the same in every particular ; and in moral works, it will as naturally and probably happen, that the ideas of different persons, equally well informed, will be the same, although the style and composition may be different.

Upon these principles, I do not think that abstract ideas or sentiments can be considered as objects of property ; and this is the chief ground on which the pursuer's plea is supposed to stand.

I do indeed admit, that every man has full power over his own ideas, and may communicate them, or reduce them into writing or not, as he thinks proper ; and after he has reduced them into writing, the copy is his full property, which he may dispose of at pleasure ; it will fall under his executry, may be affected like any other *corpus* by his creditors ; and if any person should break into his repositories, and carry off the copy, it will be an act of felony, for which he may be punished. As the author has the full right and property of his own manuscript, he has, at common law, and independent of any statute, the sole right of publishing and selling it ; and if any person, having wrongfully possessed himself of the copy, without the consent of the proprietor, should publish it, there can be no doubt, that at common law, he would be liable to an action of damages ; and the consequences of such action would be, at least, to oblige him to account for his profits. But after an author has once published his works, and reaped the benefit of the first edition, I can see nothing in the common law, that can hinder the purchaser of any copy, to make what use of it he thinks proper. The necessary consequence of publication is to make it common to all mankind ; and whoever does any act designedly, must be presumed to intend every necessary consequence

quence of that act. If so, I see no foundation at common law, for holding the purchaser of the copy as guilty of any tortious act, by making what use of his copy he thinks proper. If otherwise, I don't see where the line can be drawn: it might as well be pretended, that lending, or circulating are excluded. If indeed the author, at the time when he sells his copy, should make it a condition, that the purchaser should not communicate his copy, or publish new editions, the contravention of such condition might be the foundation for an action of damages; but where the sale is unconditional, and, more especially, where a full price is paid by the purchaser, I see nothing to hinder him to make what use of his copy he thinks proper.

It has been said, that it is just that authors should have the full benefit of any profit that may arise from the publication of their own works; and on this principle, I admit that the justice of the statute, which gives them this exclusive right for a limited term of years, may be well supported; but however equitable that may be, it has no tendency to prove that, at common law, authors had an exclusive right over their own works, after that, by their own act and deed, they had made them common. The right of a proprietor cannot extend beyond the duration of his property; and if an author is secured in the enjoyment of his property, according to its nature, he has no injustice done him.

It is highly just and proper, that the author of every new invention that is useful to the publick, should reap the benefit of his own expence, genius and labour; and upon this principle, it is, that by special statute an exclusive privilege is granted to engravers, and that the sovereign is understood to have the prerogative of granting patents, with exclusive privileges, to the authors of all new inventions; but it has not been hitherto understood, that engravers, or the authors of such new inventions had, at common law, any such perpetual exclusive right, as is here contended for. If this is the case with regard to the authors of new inventions, I own, I am not quick-sighted enough to discover any reason or argument of law which can distinguish between authors of books, and the other inventors of useful arts, who, by extreme application and genius, have made discoveries at least, as beneficial to the publick, as the works of most authors are: And it will naturally occur, how dangerous it would be, to adopt a doctrine which would establish a perpetual monopoly in almost every art, where the first inventor could be discovered: and as I see no reason for distinguishing between the authors of books, and other useful discoveries, so, upon the supposition of a common-law right, I cannot distinguish between natives and strangers; and if, in this case, we shall sustain an ac-

tion at common law, at the instance of this pursuer, we shall be under the necessity of sustaining the like action at the instance of *Monf. Voltaire*, or any other modern author on the Continent, who may with equal reason complain, that his common-law right has been violated and encroached upon by publications made of his works in this country without his consent. There is real evidence that authors with us had no idea of this right at common law, as *Lord Stair*, and others of our authors, were in use of applying to the crown for patents, to enable them to publish their own works, and these limited to a term of years; which most certainly they would not have done, if they had imagined that they had in them a perpetual right at common law: And if any doubt remained with regard to this matter, it is effectually removed by the act of the 8th of *Queen Anne*. The title of that act bears to be "for VESTING " the copies of printed books in the authors" during the times therein mentioned; which was very proper on the supposition, that a temporary right was to be created; but utterly inconsistent with the idea of a perpetual right at common law.

And the statutory part is still more inconsistent with that idea, when it declares, "that authors shall have the sole right of printing their works, for the " respective terms of fourteen and twenty-one years, and NO LONGER;" which last words seem to have been inserted for no other purpose, but to exclude the claim of a perpetual right, now made by the pursuer.—Shall we then find, in direct contradiction to the terms of the statute, that they shall have it LONGER, that they shall have it PERPETUALLY?

As to the decision given in the Court of King's Bench, which is the only conclusive argument brought from the law of England, that decision is a single one, and has the less weight, as it was not unanimous; a very learned judge of that court having given a contrary opinion.—Which of these two different opinions were best founded, according to the law of that country, I cannot take upon me to determine:—But, however that may be, it cannot influence the decision in the present case, which must be determined, not according to the law of *England*, but by the law of *Scotland*; and, for the reasons I have already given, I am clear, that, by the common law of *Scotland*, an author, after publication made by his own consent, has no right of property, such as can found him in an action of damages against those who may afterwards publish another edition of the same work. And, therefore, on the general principles I have mentioned, I am for assailing the defenders. At the same time, supposing the general argument were with the pursuer, there is a special circumstance in this case, which might go far to operate an absolution in

in favour of the defenders. It is averred by the defenders, and not denied by the pursuer, that the publication made by the defenders was not clandestinely made, but openly advertised, for a long course of time, in all the news-papers here, and by hand-bills at London; and that the work was afterwards published in numbers, at very distant intervals. In these circumstances, the pursuer, who could not be ignorant of the intended publication, ought to have interposed to prevent the publication; and as he did not, it might naturally be presumed, that he meant to abandon his right: which would be a separate ground for assailing the defender; or, at least, it might be a ground for finding the pursuer barred *personali exceptione*, from insisting in the claim of damages he now makes against the defender.

L O R D A L V A.

THE principles upon which I have endeavoured to fix my opinion in this cause, appear to me to be simple, and such as may be communicated in a few words.

The mystery of author-craft, which appears to be so considerable an object in the other part of this island, once a separate kingdom, and still entirely distinct and independent as to the laws relating to private property, seems to have taken its rise from violent stretches of prerogative in the earlier periods of the state, and to have increased by various acts of the crown, and some even of the legislature, in favour of the Stationers company and London booksellers; and, lastly, to have been confirmed by inveterate custom, and various proceedings even of the supreme courts of judicature, so as to be held, by some of the greatest lawyers, as part of the common law of that country: But, as common law, it can only operate within the proper jurisdiction of these courts, and can extend no farther, unless in so far as it may be extended in later statutes, which from the coalition of the kingdoms have acquired a more extensive power. As this plant took root and sprung up in a climate where the influence of the Roman law was for many ages entirely disclaimed by their lawyers, it is not surprising that it branched out into forms and modes very inconsistent with the principles and rules laid down in that law, and that it has in process of time given occasion to a dictionary, and a character, that will not submit to the rules to be found in that grammar. But as we are not now judging within the limits where the common law of England takes place; we are called upon to enquire, if the species of property, endeavoured to be
established

established by the pursuer, can be supported on any other foundation ; and particularly, how far it has any support from the Roman law, which our statute-book teaches us to acknowledge by the name of the common law of this ancient kingdom ; in which the ideas of literary property do not seem to have been objects of attention in any considerable degree. Nevertheless, I am happy to find, that even in the Rudiments of my most early education, there are distinctions which lead me to a decision in this case. I find there *jures*, which are said to be relative to *res incorporales*, and *dominium*, which is *jus in re corporali* : the first term of these I incline to translate—an interest ; and the second, a property, in the sense we generally use that word. I will acknowledge, that an author has an interest originally in the productions of his own brain, by which he is at liberty to publish or conceal them, as he thinks proper ; and to make what conditions he chuses on communicating them, either to individuals or the publick. When he has committed them to writing, on paper, parchment, or any other material, he has then a *res corporalis*, which is a proper object for *dominium*, or property ; and if he sells, or otherwise alienates his MS. I think he therewith conveys his whole interest, in so far as it is not specially reserved : in that case, *literæ cedent chartæ*, as the picture would also *tabulæ*, if it was conveyed by the artist. Nor do I see any absurdity in presuming such a conveyance, where the author or artist knowingly applies his knowledge and art to paper or canvas which is the property of others.—On these principles I must found my opinion, that, by the common law of this country, or any other country, where there is not a restriction upon natural liberty understood, either *tacito populi suffragio*, or by express statute, there is no antecedent property vested in an author, or his heirs, or assigns, further than what relates to the *ipsum corpus* of the MS. : that this property, in so far as it exists, is merely a creature of civil society and refined policy, and consequently will go no farther than it is expressly established by custom or statute : but we have no custom or common law for it here ; and therefore it can go no farther with us than it is carried by the statute ; which I will gladly give force to, because it goes as far as, I think, justice, and the encouragement of learning and industry, require. And I do not envy any other state or country, where either common or statute law may have carried it farther.

L O R D

L O R D P R E S I D E N T.

THE great attention which your Lordships have bestowed on this cause, and the distinctness with which you have delivered your opinions, render it almost unnecessary for me to add any thing. But I never chuse to cover my opinion, when sitting in this chair. Without farther preamble, I am of opinion with the majority of your Lordships; though I will own, that I have had much difficulty, from the weight of the sentiments of a learned judge, who presides in the Court of King's Bench; for whose opinion, as well as for his person, I entertain the highest esteem, and whom I have ever considered as one of the brightest ornaments of the law.

But I must not permit myself to be biased by the most respectable authority, when, after the most mature deliberation, I have formed the opinion which I now deliver.

At the same time, after so accurate pleadings from the bar, and reasonings amongst your Lordships, I do not intend to treat the subject at length; but only to throw out a few hints which have convinced my mind.

The question before your Lordships must be divested of an act of parliament,—of considerations of *commodum* and *incommodum*; and we must enquire, if, from the law of nature, and the law of Scotland, an author has, for him and his heirs for ever, a right to the sole publication of his works?

A literary property is claimed.—Strange! that property should lie concealed for ages, and no person step forth to vindicate it.

We are told, that it is a combination of ideas, delineated in words.—Shall it be said, that this invention differs from all others? The perfection of a machine does not consist merely in putting pieces together; but in the genius, the design.

My brother observed, that if there is such a thing as literary property, there must be a property in much nonsense. Indeed too many books are so now-a-days. Where then is the excellence of the invention of a book over that of a machine? And if there is no foundation for a claim to a perpetual exclusive right in the property of the machine, why should there be one with respect to books?

I shall put a case.—Many gentlemen have published schemes of taxation. Shall not parliament be allowed to adopt any one of those schemes, if it shall approve of it; or shall it be prevented from doing so, because it is the right of the author?

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I will

I will not run over what has been said upon engraving. The same considerations apply there as in printing. We have even had books engraved. The act concerning engravers, which gives them the same privileges given to authors, makes it clear to me, that the legislature had no idea of literary property at common law.

If there had been such a property, would the legislature have looked on for years, and seen it violated? The case which I allude to, is that of books printed abroad. This right of property then was *impune* violated, even after the act of Queen Anne, till the 12th of George II.; for untill the last mentioned act was made, it was lawful for a man, who could not print in London, to step over to Holland, print there, and then import the books to England. Is not this inconsistent with a common-law right? When we look at that statute, where we should have expected a narrative of the common-law right, had any such been understood, not a single idea of property is urged as a motive for preventing the importation of foreign editions.—No:—There is only a narrative of the revenue being defrauded of its stamp-duties: besides, had there been such a property, would not that act have been perpetual? whereas, we find that it is only temporary, though indeed it has been several times renewed.

But I go farther:—If there was really a property in the author, the law could not take it away from him; I maintain it on the great principles of property; yet that act says, that any person may re-print small tracts, if bound in with others: this would be permitting a trespass on property, if an author had a property in his compositions; and I must observe, that some of the best pieces I have seen, have consisted only of fifty or a hundred pages.

When these things are considered, it seems to me, very clear, that there is no common-law right, and that the legislature only interferes to give a temporary right.

I will not run over my brother's arguments as to Bayes's method of making a thing his own, or as to translation, which, however, do strongly shew, that a property in ideas is not understood. If a man publishes a book originally in Latin, and another shall translate that book into English, the translator will draw more profit than the author, because, there are comparatively but few who read Latin.

Besides, the specialities, mentioned in the judgment of the Court of King's Bench, convince me, that this is a property of an extraordinary nature: I have no notion of a property of this kind. One of the circumstances found by the jury, upon which that judgment proceeds, is, that a sufficient number of copies

pies was ready for sale. If a book is my property, who shall force me to throw off more copies of it than I please? I may throw off only a hundred copies; I may wish to enhance the price, though indeed it cannot be higher than that of many of our new books; I may say I want to have it sold as high as Doctor Hawkefworth's book.

That it should be maintained, that there is an express contract between the purchaser of a book and the author, that the purchaser shall not multiply copies of it, seems to me strange. The note upon a title page, mentioning that the book is printed for the author, means that that edition is printed for him.

If there is such a right as this literary property, I desire to know how it can be affected by creditors? My brother talked of confirmation; but I say if there is such a right, it is heritable; for it has *tractum futuri temporis*, so it must be adjudged.

But it is not a property at common law; it is one of those *jura imperfecta*, that an honest man will not violate; but it cannot be supported by a *rei vindicatio*.

Many instances could be given of such imperfect rights as produce no action at law; yet, in justice and equity, may not improperly be called equitable or just claims.

Thus, a man in prosperity advances to his friend in distress a sum of money; by the vicissitude of human affairs the rich man becomes poor, and the poor man rich; upon every principle of equity, justice, or gratitude, surely the person who received the former's favours, should now return them to his benefactor; yet there is no action at law that compels a man to gratitude.

An author who has given his ideas to the publick, may have done a good thing, for which the publick is indebted to him; but common law does not enforce the return that he should receive, and therefore a reasonable provision is made by statute.

As to the law of England, I much doubt, if, even there, there is understood such a right in authors as is here claimed. Where is the act of parliament, before the act of Queen Anne, that mentions an author?

All the acts of parliament, as well as all the decrees of the Star Chamber, are not in favour of authors, but of bookfellers.

During the course of the pleadings, one of my brethren seemed averse to any reflections against the privy council of Scotland. I will join with Mr. Rae on principles of liberty, for I think the privy-council and Star Chamber should go together.

The

The act of Queen Anne I am bound to regard as part of the law of Scotland ; and that, I think, is a strong confirmation that there is no right of literary property at common law. The title went in, for *securing*, it came out, for *vesting*. I could venture to say, that, if we could see the amendments, it would appear, that the word *securing* struck the house so strongly, as inferring a common-law right, that they would not allow it : and I could also venture to say, that the words *no longer*, were thrown in from the jealousy of the house as to this.

One of my brethren mentioned the *vesting act*, and seemed to think that it did not confer any right, but only secured what belonged to the crown *ipso jure* ; but there I differ from him.—By the law of England, the estates of traitors were not vested in the crown without an office of inquisition, and many other subtleties required by law.—To prevent critical objections that might arise from informality of proceedings, the statute directly vested the right to the estates in the crown, subject to the claim of all just and lawful creditors, particularly mentioned in the statute.

Mr. Rae pleaded with great force, that the act of Queen Anne could not be meant to destroy an antecedent right. I grant it could not. But I think it is clear, that the clause of return in the act, that “ if an author shall be alive “ after the expiry of fourteen years, the sole right of printing his book shall “ return to him and his heirs *for other fourteen years*,” is a proof that no previous right was understood to exist.

I am no author, and I hope in God never shall be.—I say this not out of any disrespect to any of those gentlemen.—But I think authors are not much concerned in this question.—I could set a jury of authors—with the greatest historian of this place at their head—and call for their verdict, whether this perpetual right of literary property would be to their advantage or not ; and I could venture to say, they would agree in thinking it of no moment.

If a great and laborious work shall be composed by any man, an act of parliament may be obtained for his having the sole right of printing it for a term of long endurance. I do not at present remember an instance of such an act being procured in the case of a book ; but we all know that it has often been done in the case of machines, when the inventor has thought the term allowed by a patent too short.

Upon the whole, I am of opinion that this action should be dismissed.

No more of their Lordships inclining to speak upon the cause, the LORD PRESIDENT put the question, *Sustain or repel* the defences? and the vote stood thus:

For the PURSUER.

LORD MONBODDO.

For the DEFENDERS.

LORD JUSTICE CLERK,
LORD KAMES,
LORD AUCHINLECK,
LORD ALVA,
LORD COALSTON,
LORD ELLIOCK,
LORD STONEFIELD,
LORD PITFOUR,
LORD GARDENSTON,
LORD KENNET,
LORD HAILES.

N. B. The LORD PRESIDENT only votes when the Judges are equally divided. Lord STRICHEN and Lord ALEMOORE were absent.

The Interlocutor was in the following words:—

Edinburgh, 28th July, 1773.

On report of the Lord Coalston, and having advised the Informations *hinc inde*, and heard parties procurators in the cause, the Lords sustain the defences, and affoilzie and decern.

(Signed) RO. DUNDAS, J. P. D.

The most of their Lordships relating to the said the Lord
Treasurer and the said the Lord Chancellor and the Lord
Bishop of Ely.

For the House

LORD MONROD

- LORD JUSTICE CLERK
- LORD XANTHUS
- LORD AUGUSTINE
- LORD ALVA
- LORD COLESTON
- LORD KELSON
- LORD STONESTILL
- LORD PITTOB
- LORD GARDENSTON
- LORD KENNETH
- LORD HALL

M. A. The Lord Treasurer only was with the House on the 10th
of the said month and the Lord Chancellor was absent.

The same court was in the following year:—

January 1794

On report of the Lord Gordon and being asked the questions
and heard parties present to the said Lord's in the
and official and the same.

LORD DUNBAR & C.